

*United States Court of Appeals
for the Second Circuit*



APPENDIX

DOCKET No. 75 - 1053

In The

UNITED STATES COURT OF APPEALS

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee

vs.

ERNEST HARVEY, JUNIOR,

Appellant

On Appeal from the United States District Court
for the District of Vermont

APPELLANT'S APPENDIX D

Bennett E. Greene, Esquire
Attorney for the Defendant-Appellant,

Appointed

(JUDGE'S CHARGE TO JURY)

7

PAGINATION AS IN ORIGINAL COPY

1 you have and whatever decision you make, is entirely your
2 own.

3 Now, I indicated to you at the commencement-
4 ment of this case, and I asked you whether the fact that
5 Monday is a federal holiday would interfere with any of you
6 and you advised me it would not. It is a Federal holiday
7 and in general this building is not going to be open.
8 However, the marshal has assured me he's made the necessary
9 arrangements for Court personnel, anybody coming to Court,
10 let's put it that way, to get here all right.

12 If, for any reason there's a foul up
13 when you arrive and for some reason it doesn't seem like
14 you can get from the first floor to the fifth floor, don't
15 be discouraged and don't go away please. Stick around;
16 we'll see that you're transported between the two floors.
17

18 So I ask you to have a pleasant weekend;
19 not to discuss the case with anybody, and we'll stand in
20 recess until 9:30, Monday morning. (4:45 P.M.)

21 (THIS TRIAL ADJOURNED AT 4:45 P.M., 25 OCTOBER 1974, and
22 RECONVENED AT 9:30 A.M. OCTOBER 28, 1974)

23 SIXTH DAY

24 MORNING SESSION 9:30 A.M.

26 (Jury Present)

27 THE COURT: Ladies and gentlemen, I'm

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going to appoint Mrs. NUCEDER as your foreman.

2 This case is a criminal prosecution
3 brought by the United States against the defendant, Ernest
4 HARVEY, Jr. The grand jury indictment charges the defendant,
5 Ernest HARVEY, Jr. in five separate counts. Originally
6 there were six counts but the Court has dismissed Count 5
7 with the agreement of counsel, and therefore, that count is
8 not for your consideration.

10 Count 1 charges that from or about
11 July 1, 1973 up to and including August 4, 1973, the
12 defendant, Ernest HARVEY, Jr. together with Gerald L. DUNHAM,
13 unlawfully, willfully and knowingly did combine, conspire,
14 confederate and agree together with each other and with
15 other persons known to the grand jury, to commit offenses
16 against the United States, to wit, to violate Title 18,
17 United States Code, sections 2314, 842 and 844.

19 These statutes relate to the interstate
20 transportation of stolen property and two dynamite offenses.
21 The indictment charges that in furtherance of said unlawful
22 conspiracy for the purpose of effecting the objectives
23 thereof, the defendant, Ernest HARVEY, together with
24 Gerald DUNHAM, committed the following overt acts:

26 1. On or about August 3, 1973, Gerald
27 L. DUNHAM, also known as Gary DUNHAM, and Ernest HARVEY, Jr.,

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1 the defendant, traveled from the vicinity of Barre, Vermont
2 to Newport, New Hampshire.

3 2. During June, July and August 1973,
4 the co-conspirators, Gerald L. DUNHAM, also known as Gary
5 DUNHAM, and the defendant, Ernest HARVEY, Jr., had conver-
6 sations with each other.

7 Count 2 charges that on or about
8
9 August 3, 1973, Gerald L. DUNHAM, also known as Gary DUNHAM,
10 and the defendant, Ernest HARVEY, jr., unlawfully, willfully
11 and knowingly did transport and receive and attempt to trans-
12 port and receive in interstate commerce from the District of
13 Vermont to Newport in the State of New Hampshire, explosives,
14 to wit, dynamite, with the knowledge and intent that it would
15 be used to damage and destroy buildings and other real and
16 personal property.

17 Count 3 charges on or about August 3,
18
19 1973, Ernest HARVEY, Jr., the defendant, having been convicted
20 on October 22, 1970 in the Superior Court of Grafton, New
21 Hampshire, of burglary, a crime punishable by imprisonment
22 for a term exceeding one year, unlawfully, willfully and
23 knowingly did ship and transport an explosive, to wit,
24 dynamite, in interstate commerce from the District of
25 Vermont to the State of New Hampshire, and did receive said
26 explosive which had been so shipped and transported.

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1 Count 4 charges on or about August 3,
2 1973, in the District of Vermont and elsewhere, Gerald L.
3 DUNHAM, also known as Gary DUNHAM, and the defendant, Ernest
4 HARVEY, Jr., unlawfully, willfully and knowingly did
5 receive, conceal, transport and dispose of explosive mater-
6 ials, to wit, dynamite, knowing and having reasonable cause
7 to believe that such explosive materials were stolen.

9 Count 5 has been dismissed as I have
10 advised you and is no longer for your consideration.

Count 6 charges that from on or about
August 1, 1973 up to and including September 15, 1973, in
the District of Vermont, Gerald L. DUNHAM, also known as
Gary DUNHAM, and the defendant, Ernest HARVEY, Jr., and
others to the Grand Jury known and unknown, unlawfully,
willfully and knowingly did combine, conspire, confederate
and agree together and with each other to injury, oppress,
threaten and intimidate Byron NUTBROWN III, a citizen of
the United States of America, in the free exercise and
enjoyment of a right and privilege secured to him by the
Constitution and laws of the United States, and because of
his having exercised said right and privilege, to wit, the
right and privilege to give information to the proper author-
ties concerning violations of federal law, specifically
violations of Title 18, United States Code, sections 371, 2314,

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1 842 and 844.

2 The indictment further alleges that
3 it was part of the plan and purpose of said conspiracy
4 that on or about September 8, 1973, the defendant, Ernest
5 HARVEY, Jr. did transport said Byron NUTBROWN III in an
6 automobile to a place in or near Williamstown, Vermont,
7 where Gerald L. DUNHAM, also known as Gary DUNHAM, awaited
8 them, for the purpose of interfering with Byron NUTBROWN III's
9 anticipated testimony and statements with respect to the
10 facts surrounding an attempted burglary at Lavallee's Lumber
11 Yard, Newport, New Hampshire, and violations of federal
12 explosive materials statutes, which are 18 United States
13 Code, sections 842 and 844, of the National Stolen Property
14 Act which is 18 United States Code, section 2314, and
15 conspiracy, 18 United States Code, section 371, in connection
16 therewith.

19 The indictment concludes that the alleged
20 conspiracy resulted in the death of Byron NUTBROWN III.

21 Your verdict should not be influenced by
22 the fact that the defendant was indicted for these offenses
23 by the grand jury. An indictment is merely a formal proced-
24 ural method of accusing a defendant or defendants of a crime
25 preliminary to trial.

An investigation by a grand jury is

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1 wholly onesided in the Government's favor. The Government
2 presents the grand jury all the evidence favorable to the
3 Government in order to return an indictment. And the
4 defendant has no opportunity to present evidence favorable
5 to him.

6 Therefore, the indictment is not evidence
7 of any kind against the defendant, and does not create any
8 presumption or permit any inference of the defendant's guilt.

9 -----
10 The defendant has pleaded not guilty
11 to the charges contained in the indictment. You have been
12 chosen and sworn as jurors in this case to determine the
13 issues of facts presented by the allegations of the indict-
14 ment, and the denial made by the not guilty plea of the
15 defendant.

16 You are to perform that duty without
17 bias or prejudice to any party.

18 You have observed that the defendant
19 did not take the stand to testify in his own behalf. He
20 has a constitutional right not to do so. One of the highest
21 constitutional safeguards in our system of criminal justice
22 is that a defendant is not obliged to testify or to produce
23 evidence in his own behalf, and may not be called as a
24 witness by the prosecution or compelled to give evidence
25 against himself. The exercise by a defendant of his right
26

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1 not to testify raises no presumption of guilt and permits
2 no unfounded inference of any kind to be drawn.

3 In determining the defendant's guilt or
4 innocence of a crime charged, you are not to consider in any
5 manner whatsoever the failure of the defendant to testify as
6 a witness or to produce evidence in his own behalf.
7

8 There has been evidence introduced
9 establishing that the defendant has been convicted of a
10 previous offense. I must caution you that this evidence
11 has absolutely no bearing upon the defendant's guilt or
12 innocence as to Counts 1, 2, 4 or 6, as I shall explain
13 further. It relates solely to the offense alleged in
14 Count 3, and can be considered only in considering one of
15 the elements in that count.
16

17 The law presumes a defendant to be
18 innocent of a crime with which he is charged. This presumption
19 of innocence continues throughout the trial down to the time
20 in the jury room, if that time does arrive. When you are
21 satisfied from all the evidence beyond a reasonable doubt
22 that the defendant is guilty of the crime charged.
23

24 The law permits nothing but legal evidence
25 presented before this jury to be considered in support of the
26 charges against the accused. So the presumption of innocence
27 alone is sufficient to acquit the defendant, unless you are

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1 satisfied beyond a reasonable doubt of the guilt of the
2 defendant from all of the evidence in the case.

3 You have seen and heard the evidence
4 produced in this trial, and it is the sole province of the
5 jury to determine the facts of the case. But first I would
6 like to call to your attention certain guides by which you
7 are to evaluate the evidence.
8

9 The burden of proof is on the Government
10 to prove each element of the charges against the defendant
11 beyond a reasonable doubt. You can not find the defendant
12 guilty unless you determine that the Government has estab-
13 lished by the evidence each and every essential element of
14 the crimes charged against him beyond a reasonable doubt.
15

16 However, to support a verdict of
17 guilty, you need not find every fact beyond a reasonable
18 doubt. You need only find that the crime charged has been
19 proven beyond a reasonable doubt from all of the evidence
20 in the case.

21 A reasonable doubt is a fair doubt
22 based upon reason and common sense and arising from the
23 state of the evidence. By proof beyond a reasonable doubt
24 you are not to understand that all doubt is to be excluded.
25 It is rarely possible to prove anything to an absolute
26 certainty. It must be a substantial doubt such as would
27

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1 make an honest and sensible and fair minded person hesitate
2 to act in a serious and important matter wherein ascertainment
3 of the truth was consciously being sought.

4 A reasonable doubt may arise not only
5 from the evidence produced but also from a lack of evidence.
6 The law never imposes upon a defendant in a criminal case the
7 burden or duty of producing any evidence and since the burden
8 is always upon the Government to prove the accused guilty
9 by proving beyond a reasonable doubt every essential element
10 of the crime charged.

12 And the defendant has the right to
13 rely upon a failure of the prosecution to establish such
14 proof. The defendant may also rely upon evidence brought
15 out on cross examination of witnesses for the Government.
16

17 If after impartial consideration of
18 all of the evidence you can candidly say that you are not
19 satisfied of the guilt of the defendant beyond a reasonable
20 doubt, you should find the defendant not guilty.

21 There are two types of evidence which
22 a jury may consider in determining whether or not a defendant
23 is guilty as charged. One is direct evidence, such as the
24 testimony of an eye witness. The other is circumstantial
25 evidence which consists of proof of a chain of circumstances
26 from which a conclusion regarding essential facts in the
27

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1 case may logically be drawn.

2 Regardless of the nature of the evidence,
3 the law requires that before convicting a defendant, the
4 jury must be satisfied of the defendant's guilt beyond a
5 reasonable doubt from all of the evidence in the case.
6 Circumstantial evidence is legal and proper for you to
7 consider, and you may convict upon this class of evidence
8 alone, if thereby you are persuaded beyond a reasonable
9 doubt of the defendant's guilt.

10 But the circumstances must be such as
11 will lead the guarded discretion of a just and reasonable
12 man to the conclusion that the crime charged has been
13 committed, and that a defendant is guilty of its commission.

14 You will recall that counsel in this
15 matter have stipulated or agreed as to certain facts. You
16 must accept such stipulations as evidence and regard the
17 stipulated facts as proof. Any testimony which has been
18 excluded or which has been stricken from the record is not
19 evidence in the case, and you will entirely disregard it
20 in arriving at your verdict.

21 Likewise, the arguments of the attorneys
22 and any statements which they made in their arguments are
23 not evidence and will not be considered as evidence by you.
24 You will render your verdict only from the evidence in the

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1 case which consists of the sworn testimony of the witnesses,
2 the stipulations of counsel and all exhibits which have
3 been received in evidence. It's your recollection of the
4 witnesses' testimony and not the attorney's statements as
5 to what that testimony was, which shall control you in
6 reaching your decision.

If you feel that witnesses differed as to what the facts were, it's generally a safer way to reconcile the conflicting testimony if you reasonably can, upon the theory that all of the witnesses intended to tell the truth. If you can not so reconcile the testimony, then you must determine from all of the evidence before you which of the witnesses is entitled to greater credibility.

The credibility of the witnesses and
the weight to be given their testimony are questions entirely
for your determination. The law is that you are not bound
to give the same weight, the same credit or have the same
faith in the testimony of each witness, but you should give
their testimony just such weight, just such credit and have

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1 just such faith in it that you think it is fairly entitled to
2 receive.

3 Consider the appearances of the witnesses
4 on the stand; their candor or lack of candor, their feelings
5 or bias if any; their interest in the result of the trial
6 and the reasonableness of the testimony they gave; and
7 believe as much or as little of the testimony of each witness
8 as you think you ought to.

9
10 If you find that any of the witnesses
11 in this action made statements outside of Court inconsistent
12 with their testimony in Court as to the facts involved in
13 this case, you may consider these inconsistent statements
14 only for the purpose of impeachment of the witness and not
15 for the purpose of showing the same to be true. The witness
16 is presumed to speak the truth but if you reach the conclu-
17 sion that any witness in the case has willfully or deliberately
18 given false testimony about any material fact, you may
19 reject from consideration all of his or her testimony, or
20 you may accept such part as you may deem true and disregard
21 that which you feel is false.

22
23 There has been evidence in this case
24 concerning the previous criminal record of an accomplice.
25 You may consider this evidence of a previous criminal record
26 as bearing on the credibility of this individual and weight

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1 to be given his testimony. However, such evidence has no
2 relation to the substantive crimes charged and you are not
3 to consider such evidence as bearing on the guilt or
4 innocence of the defendant.

5 An accomplice is one who unites with a
6 person in the commission of a crime voluntarily and with
7 common intent. The accomplice does not become incompetent
8 as a witness because of a participation in a crime charged.
9 On the contrary, the testimony of an accomplice alone, if
10 believed by you, may be sufficient weight to sustain a
11 verdict of guilty even though not collaborated or supported
12 by other evidence.

13 However, the jury should keep in mind
14 that such testimony is always to be received with caution
15 and weighed with great care. You should never convict the
16 defendant upon the unsupported testimony of an alleged
17 accomplice unless you believe that unsupported testimony
18 beyond a reasonable doubt.

19 There has been testimony introduced in
20 this case which we call expert testimony. In this regard,
21 I refer to the testimony of Harold LINDE, the chemist,
22 Dr. Alphons MORALI, the dentist, and Dr. Ronald WRIGHT, the
23 forensic pathologist.

24 An expert is a person who, by reason of

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1 special study, training and experience as to a given subject,
2 has knowleged concerning that subject superior to other
3 people in general. The value of expert testimony or opinion-
4 ed evidence given by an expert depends upon the honesty and
5 ability of the witness upon the facts used by him as a basis
6 for his opinion and upon his opportunity for observation.
7
8 If the facts used by him for a basis are proved and his
9 qualifications are high and he is honest and impartial
10 and has ample opportunity to make proper observations and
11 studies, his opinion may be of great value. While if his
12 opinion is based upon a state of facts which the evidence
13 does not sustain, or upon a very limited opportunity to
14 make observations, his testimony may be of little value.
15

16 Expert testimony is to be weighed by
17 you with all of the other testimony in the case, and the
18 weight of all the expert testimony in this case is for you
19 and you alone to decide.

20 Having in mind the general guidelines that
21 I have just given you, it now becomes my duty to instruct
22 you as to the law applicable to your determinations in this
23 case. It is your duty as jurors to follow the law as
24 stated in these instructions, and to apply the rules of law
25 so given to the facts as you find them from the evidence.
26
27 You will not be justified under your oath as jurymen in

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1 finding a verdict contrary to the law as the Court gives it
2 to you.

3 It is the sole province of the jury to
4 determine the facts in the case. The Court does not by
5 any instructions given to you intend to persuade you as
6 to how you should decide any question of fact. It is your
7 duty to decide all of the facts from the evidence.

8
9 All parties have a right to expect that
10 you will carefully and impartially consider all the evidence
11 in the case, follow the law as stated by the Court and reach
12 a just verdict.

13
14 I will charge you with respect to the
15 dynamite counts, that is counts two through four first; then
16 I will discuss counts one and six.

17
18 Counts one and six are both conspiracy
19 counts, and as such, they involve the application of special
20 rules which will require a more detailed explanation. For
21 that reason, I want to talk about counts one and six as
22 closely together as possible so that the same general
23 principles which apply to both counts need not be restated.

24
25 With respect to counts two through four
26 which relates to the alleged violation of the federal laws
pertaining to the importation, manufacture, distribution
and storage of explosive materials, the Government has also

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1 charged the defendant with violating 18, United States Code,
2 section 2, which is generally referred to as the aiding and
3 abetting statute.

An aider or an abettor within the meaning of this act is one who assists the perpetrator of a crime. There are two essential elements to this offence, some overt conduct in the intent to violate the law.

With reference to the first element, to
aid or abet the perpetrator of a crime, requires that the
defendant associated himself with/illegal venture, that he
participate in it as something he wishes to bring about, and
that he seeks by his actions to make it succeed. The
defendant's mere association with those who committed the
crime or knowledge that the crime was to be committed, are
not sufficient to establish this offense: You, the jury,
must be convinced beyond a reasonable doubt that the
defendant was a participant or a substantial assistant in
the commission of the crime rather than merely a knowledge-
able spectator.

With regard to the second element of
the aiding and abetting offense, I instruct you that each
offense which the defendant is accused of committing by
counts 2, 3, and 4, are ones which require specific criminal
intent or a culpable purpose in order to find him guilty.

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1 Thus, if you find that the defendant was a participant or
2 substantially assisted in the offenses alleged in counts
3 to through four of the indictment, you must then decide
4 beyond a reasonable doubt whether the defendant did so will-
5 fully and knowingly in a community of unlawful purpose with
6 some other person.

7 An aider or abettor is punishable the
8 same as the principal, the one who actually commits the
9 crime, and thus, the intent needed to convict the defendant
10 must be the same as is required to convict the principal.
11 In other words, aider and abettor must have the same know-
12 ledge and intents required as the principal. Thus, proof
13 of the defendant's knowledge of the illegal possession and
14 transportation of dynamite is necessary to convict him.

15 In order to find the defendant guilty of
16 aiding and abetting, you must find that the defendant
17 acted willfully and knowingly in aiding and abetting the
18 possession and transportation of dynamite.

19 I will now proceed to consider the
20 specifics of counts two through four.

21 Count two of the indictment, in
22 substance, charges that the defendant together with Gerald
23 DUNHAM, unlawfully, willfully and knowingly transported
24 dynamite from Vermont to New Hampshire, with the knowledge

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1 and intent that it would be used to damage and destroy
2 buildings and other real and other real and personal property.
3 This allegation is based upon 18, United States Code, section
4 844.d.

5 In order to find the defendant guilty
6 on count two, you must find beyond a reasonable doubt each
7 of the following essential elements. First, that on or
8 about August 3, 1973, Ernest HARVEY, Jr. transported or
9 aided and abetted the transportation of dynamite from
10 Vermont to New Hampshire.

12 Second, that he did so with the knowledge
13 and intent that the dynamite would be used to damage and
14 destroy buildings or other real and personal property;

15 And third, that he acted willfully and
16 knowingly.

18 The first element of the crime that the
19 Government must prove beyond a reasonable doubt is that the
20 defendant either transported or aided and abetted the
21 transportation of dynamite from Vermont to New Hampshire.
22 In this regard, you should consider the general principles
23 relating to aiding and abetting which I discussed earlier.

25 As the second element of this offense,
26 the Government must prove that the defendant transported
27 the dynamite with the knowledge and intent that the dynamite

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1 would be used to damage or destroy buildings or other real
2 and personal property. In this regard, you should consider
3 whether or not the Government has established that the
4 Defendant HARVEY knew what the dynamite was to be used for
5 or what its intended use was.

6 The third element of this offense is
7 that the defendant acted willfully and knowingly. By
8 willfully and knowingly, I mean that the defendant must
9 have acted voluntarily and intentionally with the intent
10 being to disobey or disregard the law.

12 Knowledge of a defendant need not be
13 proved by direct evidence and indeed, it seldom can be.
14 However, like any other facts and issues, it can be
15 established by circumstantial evidence.

17 The meaning and significance of a
18 particular act or conduct may be and usually does depend
19 upon the circumstances surrounding the act or conduct. You
20 should consider the acts and conduct of the defendant, and
21 whether such facts, if you believe them, make it likely or
22 unlikely, probable or improbably, that the defendant fully
23 and precisely understood what he was doing.

25 In count 3, the indictment alleges that
26 the defendant, having been convicted of an offense punishable
27 by a term of imprisonment exceeding one year, unlawfully,

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1 willfully and knowingly transported dynamite from Vermont to
2 New Hampshire, and also received dynamite which had been so
3 shipped. The elements of the offense which must be
4 established beyond a reasonable doubt are as follows:

5 First, that on or about August 3, 1973,
6 Ernest HARVEY, Jr. transported dynamite in interstate commerce
7 or that he aided and abetted such transportation.

8 Second, that at the time he did so,
9 HARVEY had been convicted of a crime punishable by imprison-
10 ment for a term of more than one year.

12 Three, that he acted willfully and
13 knowingly.

14 With respect to the first element, you
15 should consider the general principles with respect to
16 aiding and abetting which I outlined earlier. In all other
17 respects, I think the description of the elements of the
18 offense is sufficiently clear, as to warrant no further
19 comments on my part.

21 The second element requires that the
22 defendant, at the time he transported the dynamite
23 had been convicted of a crime punishable by a term of
24 imprisonment for a term of one year. There has been uncon-
25 troverted evidence introduced that the defendant in 1970
26 was convicted of such an offense punishable by a term of

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1 imprisonment exceeding one year. Nevertheless, you are
2 required to find this element beyond a reasonable doubt.

3 I wish to caution you that the evidence
4 of the defendant's prior conviction is to be considered by
5 you only in connection with this element of count 3. And
6 it is not to be considered by you to establish the
7 defendant's criminal character in any way.
8

9 The requirement that the defendant acted
10 willfully and knowingly is the same in this count as I
11 explained to you in connection with count 2.

12 The fourth count of the indictment
13 alleges that on or about August 3, 1973 Gerald DUNHAM and
14 the defendant, Ernest HARVEY, Jr. unlawfully, willfully and
15 knowingly did receive, conceal, transport and dispose of
16 dynamite knowing or having reasonable cause to believe that
17 it was stolen. The essential elements of this offense are:

18 First, that on or about August 3, 1973
19 in the District of Vermont, the defendant, HARVEY, received,
20 concealed, transported or disposed of dynamite, or aided and
21 abetted such receipt, concealment, transportation or disposal.

22 Second, that at the time he did so,
23 HARVEY knew or had reasonable cause to believe that such
24 dynamite was stolen; and third, that he acted willfully and
25 knowingly.

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1 I think the first and third elements of
2 this offense are sufficiently clear as to require no further
3 comment, as long as you keep in mind the general principles
4 which I have outlined previously.

5 The second element requires that the
6 defendant knew or had reasonable cause to believe that the
7 dynamite was stolen. In order to establish this offense,
8 the Government must prove beyond a reasonable doubt that
9 the dynamite was in fact stolen and the defendant knew it
10 was stolen or had reasonable cause to believe it was stolen.
11 The offense charged was the interstate transportation of
12 stolen explosives, and not the theft of the dynamite.

13 I will now charge you with respect to the
14 conspiracy counts.

15 Count one alleges that the defendant,
16 Ernest HARVEY, Jr. together with Gerald DUNHAM was a member
17 of a conspiracy to commit offenses against the United States
18 in violation of 18, United States Code, section 371. The
19 offenses alleged to be the object of the conspiracy are,
20 one, the interstate transportation of stolen property worth
21 more than five thousand dollars, to wit, the proceeds of
22 the attempted burglary. Two, the receipt, concealment,
23 transportation, shipment, storage, barter, sale or disposition
24 of any explosive material knowing or having reasonable cause

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1 to believe that such explosive materials were stolen, and
2 three, the interstate transportation of any explosive with
3 the knowledge or intent that it will be used to kill, injure
4 or intimidate any individual or unlawfully to damage or
5 destroy any building, vehicle or other real or personal
6 property.

7 Before you can decide the specifics of
8 this charge, I must advise you of some of the basic principles
9 which are involved in the determination of the offense
10 of conspiracy. A conspiracy is a combination of two or
11 more persons by concerted action to accomplish a criminal
12 or unlawful purpose or to accomplish by criminal or unlawful
13 means some purpose not in itself criminal or unlawful.
14

15 The essence of a conspiracy is the
16 unlawful agreement between the conspirators, but it is not
17 necessary to find an express agreement, orally or written,
18 before you can find that a conspiracy existed. What must
19 be shown, however, is that the members in some way impliedly
20 or expressly came to a mutual understanding. This showing
21 need not be made by direct evidence; it may be and usually
22 is proved by circumstantial evidence.
23

24 It is not necessary for the Government
25 to prove that the objects of the conspiracy were carried out
26 or that the conspiracy was successful. Conspiracy is
27

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punishable whether or not the intended offenses are committed.

One; that the conspiracy charged in the

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1 indictment was willfully formed and was existing at or
2 about the date alleged.

3 Two, that the defendant knowingly and
4 willfully became a member of the conspiracy.

5 Three, that one of the conspirators
6 thereafter knowingly committed at least one overt act in
7 furtherance of the conspiracy.

8 The first element is that the conspiracy
9 was willfully formed and existed at or about the time alleged
10 in the indictment. The indictment alleges that the conspiracy
11 commenced on or about July 1, 1973, and continued up to and
12 including August 4, 1973.

13 Now, I am talking at this time, ladies
14 and gentlemen, about the conspiracy charged in count one.
15 The Government need not prove that the conspiracy existed
16 over the whole course of time which it is alleged in the
17 indictment. If you feel that within that period, all of
18 the elements of the crime have been demonstrated to your
19 satisfaction beyond a reasonable doubt, then that crime
20 becomes complete and the fact that the Government did not
21 show it as being carried on as early or as long as the
22 indictment says, in itself is not of any importance as far
23 as the elements of the crime are concerned.

24 In this case, to satisfy the first

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1 element of the offense, you must be satisfied beyond a
2 reasonable doubt that two or more persons combined for the
3 purpose of committing any or all of the three offenses
4 against the United States. The first is to transport in
5 interstate commerce goods, wares, merchandise, securities and
6 money from a value of five thousand dollars or more, to
7 wit, the proceeds of a burglary knowing the same to have
8 been stolen.

10 The second is, to receive, conceal,
11 transport, ship and store explosive materials, to wit,
12 dynamite, knowing and having reasonable cause to believe
13 that such explosive material was stolen.

14 And third, to transport and receive
15 and attempt to transport and receive in interstate commerce
16 an explosive, to wit, dynamite, with knowledge and intent
17 that it would be used unlawfully to damage and destroy a
18 building and other real and personal property.

20 As I pointed out earlier, in order to
21 constitute a violation of this conspiracy count, it is not
22 necessary to show that the conspiracy was successful or that
23 the intended offenses were completed. Furthermore, it is
24 not necessary that the Government prove that the conspiracy
25 actually contemplated violation of each of the three
26 statutory offenses. It is sufficient for the purpose of

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1 count one if you find beyond a reasonable doubt that it was
2 part of the conspiracy to commit any one of the three
3 alleged offenses.

4 You must also find that the second
5 element that the defendant knowingly and willfully partici-
6 pated in the conspiracy with the intent to further some
7 object or purpose of the conspiracy by knowingly and willfully
8 the defendant acted voluntarily and intentionally with the
9 intent being to disobey or disregard the law. By joining
10 the conspiracy, I mean that the defendant became a member
11 of it.

13 Mere association with other conspirators
14 is not sufficient to make one a member of the conspiracy.

16 The third element of the crime of con-
17 spiracy is that one or more of the conspirators during the
18 existence of the conspiracy knowingly committed at least
19 one overt act in an effort to effect some purpose or object
20 of the conspiracy. You must also find that this act or acts
21 follow and tend towards the accomplishment of the plan of
22 the conspiracy.

23 As to count one, two such overt acts
24 were alleged in the indictment. First, on or about August 3,
25 1973, Gerald L. DUNHAM, also known as Gary DUNHAM, and
26 Ernest HARVEY, Jr., the defendant, traveled from the vicinity

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1 of Barre, Vermont to Newport, New Hampshire; and second,
2 that during June, July and August 1973, the co-conspirators,
3 Gerald L. DUNHAM, also known as Gary DUNHAM, and the
4 defendant, Ernest HARVEY, Jr., had conversations with one
5 another.

In considering the elements of the
offense of conspiracy, as I have stated them above, you
may consider all of the evidence in the case. If you find
that each of the elements of the offense of conspiracy
have been proved beyond a reasonable doubt with respect to
the defendant, then you must return a verdict of guilty
against the defendant. If, however, you're not convinced
beyond a reasonable doubt as to the guilt of the defendant,
you must return a verdict of not guilty as to the defendant.

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Specifically, the indictment refers to
the right and privilege to give information to the proper
authorities concerning violations of federal law, specifically
violations of Title 18, United States Code, sections 371,
2314, 842 and 844. The indictment alleges that it was part
of the plan and purpose of the conspiracy that on or about
September 8, 1973, the defendant, Ernest HARVEY, Jr., did
transport Byron NUTBROWN III to a place in or near Williams-
town, Vermont where Gerald DUNHAM awaited for him for the
purpose of interfering with Byron NUTBROWN III's anticipated
testimony and statements with respect to facts surrounding an
attempted burglary at Lavallee's Lumber Yard in Newport,
New Hampshire, and violation of federal explosive material
statutes, 18, United States Code, sections 842 and 844 of
the National Stolen Property Act, 18, United States Code,
section 2314; and conspiracy, 18, United States Code, section
371 in connection therewith. The indictment concludes that
the alleged conspiracy resulted in the death of Byron
NUTBROWN III.

22 Like the offense alleged in count one,
23 this is a conspiracy charge, and therefore, the same
24 general principles pertaining to conspiracy offenses which
25 I have just discussed previously apply to this count as well.
26
27 However, there is an important exception, and that is that

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1 the Government does not require to show any overt act in
2 order to establish an offense under the applicable statute;
3 that is under 18, United States Code, section 241.

Under this section of the United States
Code, penalizing conspiracy to deprive a person of rights
secured to him by the Constitution or laws of the United
States, a crime is completed by the agreement, and no overt
act is necessary.

10 Before you can convict the defendant,
11 Ernest HARVEY, Jr., of the crime of conspiracy to violate
12 the civil rights of Byron NUTBROWN III, you must be
13 satisfied beyond a reasonable doubt that each of the elements
14 of the offense has been proved with respect to this
15 defendant. The elements of this crime are as follows:

17 First, at sometime from on or about August
18 1, 1973 up to and including September 15, 1973, Ernest
19 HARVEY, Jr. combined, conspired, confederated or agreed
20 with any other person to injure, oppress, threaten or
21 intimidate Byron NUTBROWN III.

24 And third, that at least one purpose of
25 the conspiracy to injure, oppress, threaten or intimidate
26
27 Byron NUTBROWN III was to interfere with his anticipated

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1 testimony and statements with respect to an attempted
2 burglary at Lavallee's Lumber Yard and the federal dynamite
3 violations and stolen property violations in connection
4 with that attempt.

5 The first element is that the conspiracy
6 was willfully formed and existed at or about the time
7 alleged in the indictment. As I described in connection with
8 count one, the dates are not critical as long as you are
9 convinced beyond a reasonable doubt that the conspiracy
10 existed sometime during the alleged period.

12 You must also find that the defendant
13 knowingly and willfully participated in the conspiracy with
14 the intent to further some object or purpose of the conspiracy.
15 By knowingly and willfully, I mean that the defendant acted
16 voluntarily and intentionally with the intent being to
17 disobey or disregard the law. By joining the conspiracy,
18 I mean that the defendant became a member of it. Mere
19 association with other conspirators is not sufficient to
20 make one a member of the conspiracy.

22 The second element of the offense is
23 that Byron NUTBROWN III, be . a United States citizen.
24 The evidence establishing Mr. NUTBROWN as a citizen of
25 the United States is uncontradicted.

27 The third element of the offense which

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1 you must find beyond a reasonable doubt is that at least
2 one purpose of the conspiracy was to interfere with
3 Byron NUTBROWN's testimony and statements with respect to
4 the attempted burglary at Lavallee's Lumber Yard, and the
5 federal dynamite conspiracy and stolen property violations
6 in connection with that attempt. You will note that I
7 stated only one purpose of the conspiracy need be to
8 interfere with Byron NUTBROWN's right to give statements
9 and testimony relating to federal crimes. In other words,
10 there may also be other purposes of the conspiracy.

12 If, however, you find that one of the
13 purposes of the conspiracy was to interfere with sources of
14 testimony relating to or prevent proof of federal violations
15 then the requirements of section 241 are met.

17 Crime charged in this case is a crime
18 which requires proof of specific intent before the defendant
19 can be convicted. Specific intent as the term implies means
20 more than the general intent to commit the act. To
21 establish the specific intent, the Government must prove
22 that the defendant knowingly did an act which the law
23 forbids, purposely intending to violate the law. Such
24 intent may be determined from all of the facts and circum-
25 stances surrounding the case.

27 An act is done knowingly if done

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1 voluntarily and intentionally and not because of mistake or
2 accident or other innocent reason.

3 In considering the elements of the
4 offense of conspiracy as I have stated them above, you may
5 consider all of the evidence in this case. If you find that
6 each of the elements of the offense of conspiracy have been
7 proved beyond a reasonable doubt in respect to the defendant,
8 then you must return a verdict of guilty against the
9 defendant. If, however, you are not convinced beyond a
10 reasonable doubt as to the guilt of the defendant, you must
11 return a verdict of not guilty as to the defendant.

12 If you find that the defendant, Ernest
13 HARVEY, Jr., is guilty of the conspiracy charged in the
14 indictment, then you must go on to determine whether or not
15 the conspiracy resulted in the death of Byron NUTBROWN III.

16 If you find the defendant guilty of
17 count six, I will ask you to also make a specific finding
18 as to whether the conspiracy resulted in the death of
19 Byron NUTBROWN and advise as to this at the time you render
20 your verdict.

21 I want to remind you at this time as
22 I did throughout the trial that any statements of Byron
23 NUTBROWN III may have given which were introduced during
24 the course of the trial, either by exhibit or in the course

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1 of testimony, may be considered by you only in connection
2 with count six, and then not to the truth of the matters
3 asserted in those statements, but solely to show the nature
4 of such knowledge and awareness of Byron NUTBROWN may have
5 had with reference to the items relevant to count six.

7 These statements are to be entirely
8 disregarded by you in considering counts one through four,
9 which means that such evidence as you consider in connection
10 with those counts shall not include the statements intro-
11 duced into evidence which Byron NUTBROWN may have made.

Again I want to suggest to you that
while the law is for the Court and you are to apply the
law as given you in these instructions, the findings of
the facts in this case is entirely for you. Whatever
reference the Court has made to the evidence or pleadings
is only for the purpose of making application of the
principles of law to the issues in this case, and without
any purpose of indicating in the least degree how the Court
may think that the case ought to be decided on the facts.
That is for you to determine.

24 The exhibits which have been admitted
25 in evidence during the trial are for your consideration
26 and your deliberations. You will also send a copy of the
27 indictment in this matter to you in the jury room.

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EXCEPTIONS TO THE CHARGE

You must return a verdict of guilty or not guilty as to each count. Your verdict must be unanimous. It will be delivered orally by your foreman in response to inquiries made by the Clerk. This will include an inquiry, if you find the defendant guilty of count six, whether the conspiracy resulted in the death of Byron NUTBROWN III.

Gentlemen?

10 (ALL COUNSEL AND REPORTER APPROACHED THE BENCH - OUT OF
11 HEARING OF THE JURY)

12 MR. GRAY: Your Honor, as a preliminary
13 matter I take it that Mr. HARVEY's waiver to be present
14 applies to this conference, Mr. GREENE?

16 MR. GREENE: I do waive for Ernest HARVEY
17 his right to be present at this particular conference. I
18 don't think it will add anything.

19 MR. GRAY: Thank you. Your Honor, the
20 Government has only one comment and perhaps, or a request,
21 in connection with the description of the overt act in
22 count one. The Count indicated as the second overt act that
23 they must find a conversation between Mr. HARVEY and
24 Mr. DUNHAM during the time it indicated, that the indictment
25 also charges that there were conversations - I'm sorry,
26 that's an overt act - the indictment also charges that there

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